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No. 06-1223

In the Supreme Court of the United States

JANET M. MERILLAT,

Petitioner,

v.

METAL SPINNERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Once an employer has articulated a legitimate, non-discriminatory reason for eliminating an employee's position as part of a reduction in force, the employee can avoid summary judgment only by providing evidence that the employer's reason was pretextual.

Can an employee avoid summary judgment when she has presented no evidence creating a genuine issue whether the employer lacked an honest belief in its proffered nondiscriminatory reason or that the employer's honest belief was unreasonable?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent Metal Spinners, Inc.'s parent company is Metal Spinners Holdings, Inc., an Indiana corporation. No publicly held company owns stock in Metal Spinners, Inc.

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STATEMENT OF THE CASE

Background

Metal Spinners, Inc. is a manufacturing business with a facility in Angola, Indiana, that performs metalwork, including metal spinning, which consists of forming sheet metal blanks into circular parts such as cones and cylinders. App. 2a.[1]

Janet Merillat began work at Metal Spinners in 1983 as purchase manager and later worked as senior buyer. App. 2a, 30a. She had one year of post-college secretarial training, and all of her relevant experience arises from her 19 years as an employee of Metal Spinners. App. 16a n.4.

In 2002, Metal Spinners hired Craig Wehr to fill the newly created position of vice president of procurement and materials management. App. 3a. Wehr had a business degree from Indiana University, and he had several years of experience as a purchasing manager in the metals industry. App. 16a n.4. He had experience and contacts in varied types of metal manufacturing, and he supervised installation of a new computer system for one past employer. App. 16a, 23a. He was younger than Merillat and was paid about twelve thousand dollars per year more than Merillat. App. 3a, 4a.

In 2002 and 2003, Metal Spinners experienced financial difficulties. App. 3a. The company's board approved a reduction-in-force to save money. App. 3a-4a; C.A.

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[1] References to the appendix in the petition are noted as "App. _a." References to Metal Spinners' appendix in the Court of Appeals are noted as "C.A. App. _."

App. 234. Merillat and three other employees were terminated. App. 3a. The other three employees terminated were males, and one was younger than 40. App. 3a-4a, 30a.[2]

Since the reduction in force, some of Merillat's duties have been taken over by Wehr and another employee. App. 4a. Other of her former duties now are carried out by a computer system called Vantage. *Id.*

Proceedings Below

Merillat sued Metal Spinners, alleging gender and age discrimination.[3] App. 31a. The District Court granted summary judgment to Metal Spinners. It ruled that Merillat was unable to show any direct proof of discrimination or to make out a *prima facie* case based on indirect evidence using the method set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). App. 32a, 37a. The District Court further ruled that she failed on two parts of the *McDonnell Douglas* test because she did not show (1) that she was meeting her employer's reasonable expectations or (2) that similarly situated employees outside the protected classes were treated more favorably. App. 33a-36a.

With regard to her performance, the District Court recognized that in a reduction-in-force, some employees must be terminated, including employees whose performance

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[2] One of the four ultimately accepted a demotion rather than termination.

[3] Merillat also alleged violations of the Equal Pay Act. Those claims were also resolved by summary judgment in favor of Metal Spinners. The Equal Pay Act claims are not raised in Merillat's petition for certiorari and are not discussed in this opposition.

otherwise would be deemed adequate. App. 36a. In other words, shortcomings that might ordinarily cause no adverse consequences might support termination during a reduction-in-force. "In a reduction in force, someone has to go." *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 573 (7th Cir. 1998).

As an alternative holding after determining that Merillat failed to establish a *prima facie* case, the District Court looked at whether Merillat could show that Metal Spinners' proffered reasons for eliminating her position were pretextual. App. 39a. The court stated that, in the reduction-in-force context, Merillat could meet her burden by showing that the entire reduction-in-force was pretextual or that the reasons for eliminating her position were pretextual. App. 40a.

The District Court determined that the reduction-in-force was not itself pretextual based on unrebutted evidence of Metal Spinners' financial problems and uncontradicted testimony that the company chose to eliminate certain positions to achieve financial stability. App. 38a-39a. It then set forth Metal Spinners' reasons for choosing to eliminate Merillat's position: "(1) Wehr had more desirable skills, education, and experience than Merillat and was more willing to implement new strategies; (2) many of Merillat's duties could be eliminated by the implementation of the Vantage system; and (3) Merillat had a history of difficulties in working with co-workers." App. 41a.[4]

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[4] The District Court elaborated that Metal Spinners preferred Wehr because he had better potential to fulfill the company's strategic goals, while "Merillat had been very resistant to making the changes that Wiland [the CEO] felt were necessary for Metal Spinners' success." App. 41a. Also, Merillat was "resistant to switching to the Vantage system. Instead, she continued to do

As to these proffered reasons, the District Court stated that Merillat could prove pretext directly by showing that the employer was motivated by a discriminatory reason "or indirectly by evidence that the employer's explanation is not credible" because "the proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge." App. 39a (internal quotation omitted).

The District Court concluded that Merillat's response to these legitimate, nondiscriminatory reasons was off-target. Merillat tried to show that the employer made a bad decision because Wehr did not do a very good job after she left. App. 42a. But Merillat's approach did not meet her burden to address the *credibility* of Metal Spinners' reasons for eliminating her job. The role of the courts is not to second-guess sincere business decisions. *Id.* Merillat made no effort to show that Metal Spinners' reasons were pretextual. *Id.* She failed to address the correct standard and therefore failed to prove pretext.

The Seventh Circuit affirmed summary judgment for Metal Spinners, but on a different analysis. The Seventh Circuit found that Merillat might be able to prove a *prima facie* case because there were genuine issues as to whether Merillat's performance met her employer's expectations, despite her employer's statements that her performance was not satisfactory. App. 13a. It also found that she met that part of the *McDonnell Douglas* test requiring her to show that others similarly situated were treated more favorably – as

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redundant data entry into two software programs in order to get reports that she wanted to assist her with her purchasing duties." *Id.*

modified to address reductions-in-force – because some of her job functions were absorbed by employees outside the protected class. *Id.* Metal Spinners therefore could not obtain summary judgment on its theory that Merillat failed to make a *prima facie* case. *Id.*

But the Seventh Circuit agreed that Merillat failed to show that Metal Spinners' proffered reasons for terminating her in the reduction-in-force were pretextual. App. 14a. The court stated:

> Metal Spinners offers several nondiscriminatory reasons for terminating Ms. Merillat as part of its RIF: Many of her duties could be eliminated by the implementation of the Vantage computer system; she had a history of difficulty working with co-workers and suppliers; she had less desirable education and experience than Wehr and Wehr was more willing and better able to implement new strategies.
>
> Ms. Merillat admits that many of her tasks are now performed by the Vantage computer system and therefore, at least one of the reasons given by Metal Spinners for her termination is not pretextual.

App. 13a-14a.

The Seventh Circuit then addressed Merillat's argument that Wehr rather than Merillat should have been terminated in the reduction-in-force because his performance was worse than hers and his salary was higher than hers. App. 14a. Like the District Court, the Seventh Circuit reasoned that it could not properly address Merillat's arguments about Wehr's performance problems because, to the extent Merillat even showed performance problems, all of her evidence arose from

the time period *after* she was terminated. App. 14a-15a. The Seventh Circuit concluded that it could not engage in such retrospective analysis because those facts were not available to the employer at the time of the reduction-in-force. App. 15a.

Also like the District Court, the Seventh Circuit then looked at whether Metal Spinners' reasons for terminating Merillat were honest. "Even if Metal Spinners' decision was, in retrospect, a mistake, that conclusion, made with the benefit of hindsight, does not mean that Metal Spinners honestly did not believe that retaining Wehr and terminating Ms. Merillat was the appropriate decision at the time it was made." App. 15a. The court concluded that Merillat had provided no evidence that Metal Spinners did not honestly believe that the decision to terminate Merillat and retain Wehr was the right decision at the time it was made. *Id.*

The Seventh Circuit further concluded that the District Court applied the correct standard for a reduction-in-force case: "Even if Ms. Merillat's performance was sufficiently acceptable to justify retaining her in better times, that consideration does not establish that Metal Spinners' reasons for terminating her in a RIF situation were pretextual." App. 17a. Even if her performance would be deemed satisfactory in other situations, she failed to show that Metal Spinners did not honestly believe she was a poor performer in the reduction-in-force context. *Id.* She therefore failed to show pretext that would defeat Metal Spinners' proffered non-discriminatory reasons for terminating her. App. 17a-18a.

Perceived Misstatements

As required by Supreme Court Rule 15.1, Metal Spinners notes instances in which Merillat has not fully or accurately represented record evidence.

Merillat's characterization that her termination was not part of a proper reduction in force is unsupported by any record evidence. She refers to the "alleged RIF" and argues that her termination could not have been economically motivated because Metal Spinners would have saved more money by terminating Wehr than by terminating Merillat. Pet. at 3-4, 8. But the evidence in the record of Metal Spinners' reduction-in-force was uncontradicted. Metal Spinners provided a financial statement showing that it lost money six months in a row in 2003. C.A. App. 252. Metal Spinners' CEO discussed a reduction-in-force with the company's board and decided to terminate four individuals. App. 3a-4a, 36a; C.A. App. 234.

Obviously in a reduction-in-force the mostly highly paid employees are not always terminated. Rather, businesses make decisions to eliminate positions based on many factors. In this case, Merillat's position was a likely candidate for elimination because many of her tasks could be performed by a computer system, she had less desirable education and experience than Wehr, and she had a history of problems, including her admitted inability to get along with co-workers. App. 14a, 38a-39a.

Also, Merillat's pervasively repeated statements that her job duties were "exactly the same" or constituted "the same job" done by Wehr are not correct and contradict the conclusions of both courts below. *See, e.g.*, Pet. at 3, 7, 9. Both the District Court and Court of Appeals concluded that

Wehr had more responsibilities than Merillat. The Court of Appeals concluded that Wehr had corporation-wide strategic planning responsibilities and supervisory duties (including supervision of Merillat) that Merillat did not have. App. 20a-22a. The District Court had come to similar conclusions. App. 47a. These conclusions are contradicted by nothing other than Merillat's own subjective statements. C.A. App. 120-21, 163-65, 313, 400, 452, 457-58.

Additionally, Merillat's characterization that Wehr's performance was inferior to hers relies on hindsight and irrelevant evidence and ignores evidence of Merillat's own shortcomings, such as her admitted history of problems getting along with co-workers. Pet. at 11-15. She derides Wehr's experience with other metal companies in comparison to hers at Metal Spinners, pet. at 12, but his contacts with other metal companies were an important factor in his hiring, App. 16a n.4. She argues that inventory sat longer on Wehr's watch, pet. at 12, but the company's CEO president testified that he did not use inventory turns as a management tool and was not concerned with it, C.A. App. 420. She assails a slight increase in the number of metal suppliers under Wehr's management, pet. at 13, but the CEO testified that this trivial growth was untroubling and Wehr improved supplier relationships, C.A. App. 275, 435. She argues that despite Wehr's superior education and experience, her know-how should have been the factor the employer preferred, an argument that asks the courts to substitute their judgment for the employer's. Pet. at 11. Indeed, this whole section of her statement of the case is an argument that the courts should engage in a retrospective evaluation of Metal Spinners' management decisions.

REASONS TO DENY THE WRIT

I. No Split Among the Circuits Justifies Certiorari.

To the extent the circuits diverge on the degree to which an employer's honest belief must be objectively reasonable to constitute a defense in a Title VII case, that divergence is minor, likely to decrease as decisional law develops, and insufficient to justify certiorari under Supreme Court Rule 10(a). Merillat's portrayal of a serious circuit split is overblown and relies on cherry-picked authority rather than mainstream case law. The circuits in fact approach the issue of pretext in employment discrimination in fundamentally the same fashion.[5]

A. The Seventh Circuit's "Honest Belief" Rule Is in the Mainstream.

The Seventh Circuit has long applied an "honest belief" rule, which Petitioner characterizes as the issue in this case. The rule applies after an employment discrimination plaintiff has made a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and the employer has articulated one or more "legitimate, nondiscriminatory" reasons for taking the disputed employment action. *Id.* at 802. The "honest belief" rule requires the plaintiff to show that the employer did not honestly believe its articulated reasons and such reasons are merely a pretext for unlawful discrimination.

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[5] Merillat, of course, does not believe that any circuit's standard is appropriate. Rather, she advocates a wholly new "reasonable employer" standard that no court has applied. Pet. at 17 n.15.

No circuit requires the employer's "legitimate, nondiscriminatory" reason to be factually correct, so long as the employer reasonably relied on it at the time. The rationale for this approach is apparent – to do otherwise would require courts to factually probe and second-guess reasonable business judgments of the sort employers engage in every day, making the courts into the "super-personnel department" they are not intended to be. *See, e.g., Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 324 (7th Cir. 2003) (court does not sit as a "super-personnel department"); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 627 (6th Cir. 2006), *cert. denied*, 2007 WL 514828 (Apr. 23, 2007) (same).

The Seventh Circuit uses the "honest belief" rule, which it crystallized in *McCoy v. WGN Continental Broadcasting Company*, 957 F.2d 368, 373 (7th Cir. 1992), to judge an employer's stated rationale.[6] In *McCoy*, the employer articulated non-discriminatory reasons for terminating McCoy, and McCoy claimed that the reasons were so implausible as to be pretextual. *Id.* The court stated that "our inquiry is limited to 'whether the employer gave an honest explanation of its behavior.'" *Id.* (quoting *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987)). It explained that "the issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the

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[6] The Petitioner states incorrectly in her Petition at 21 that "the 'honest belief' rule was first developed by the Seventh Circuit in *Kariotis v. Navistar International Transportation Corporation*, 131 F.3d 672 (7th Cir. 1997)." The Seventh Circuit actually first developed its "honest belief" approach in earlier cases such as *McCoy* and *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987).

employer honestly believes in the reasons it offers." *Id.* The Seventh Circuit has employed this approach in many later cases.

Despite this language, however, the Seventh Circuit's approach does not unquestioningly accept the employer's proffered reasons. Rather, the test explores the reasonableness of the employer's professed belief. "[A] determination of whether a belief is honest is often conflated with analysis of reasonableness." *Flores v. Preferred Technical Group*, 182 F.3d 512, 516 (7th Cir. 1999). The Seventh Circuit has stated that "the more objectively *un*reasonable a belief is, the more likely it will seem that the decisionmaker did *not* actually hold it." *Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1013 (7th Cir. 2004) (emphasis in original).

Recent Seventh Circuit cases show that, in practice, the Seventh Circuit will analyze the objective facts surrounding an employer's decision and, when the facts and circumstances indicate that the employer's belief is not honestly held, will rule in the employee's favor. *See, e.g., E.E.O.C. v. Target Corp.*, 460 F.3d 946, 960-61 (7th Cir. 2006) (analyzing whether Target's decision not to hire an African American applicant was honestly justified and holding that objective evidence indicated that there was a material issue of fact as to whether Target's non-discriminatory reason was honestly held); *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762, 780-82 (7th Cir. 2006) (analyzing whether an employer honestly believed the reasons given for its adverse employment action and holding that the employee had created a triable issue of fact regarding pretext based on the objective evidence).

Merillat's effort to show a circuit split is colored by what may be the Seventh Circuit's rhetorical excess in describing

its approach. Merillat repeats no fewer than eight times in her petition (including in the question presented) a quotation or paraphrase from *Kariotis v. Navistar International Transportation Corporation*, 131 F.3d 672, 676 (7th Cir. 1997): "Moreover, if the company honestly believed in those reasons, the plaintiff loses even if the reasons are foolish or trivial or baseless." The Seventh Circuit has repeated this phrasing in several other cases, and the Ninth Circuit has also used it. *See, e.g., Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). This pithy idiom may appear overly deferential to employers, but the Seventh Circuit's decisions, such as those described in the preceding paragraph, show that the court does not simply accept without examination whatever reasons an employer may give for an employment action.

B. The Sixth Circuit's Approach Does Not Differ in Substance from the Seventh Circuit's "Honest Belief" Test.

Contrary to Merillat's depiction, the Sixth Circuit's approach does not differ substantively from the Seventh Circuit's approach. The Sixth Circuit has stated that "[t]o the extent the Seventh Circuit's application of the 'honest belief' rule credits an employer's belief without requiring that it be reasonably based on particularized facts rather than on ignorance and mythology, we reject its approach." *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). Further, "in order for an employer's proffered non-discriminatory basis for its employment action to be considered honestly held, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Id.* at 807. The court went on to say: "If the employer is unable to produce such evidence to support its employment action, then the 'honest belief' rule

does not apply. Even if the employer is able to make such a showing, the protection afforded by the rule is not automatic." *Id.*

Like the Seventh Circuit, however, the Sixth Circuit does not require perfection: "we do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." *Id.* The Seventh Circuit has stated that its approach to pretext is not identical to the Sixth Circuit's approach. *See Little*, 369 F.3d at 1012 n.3 (7th Cir. 2004) (declining to adopt the Sixth Circuit's approach to pretext); *Flores*, 182 F.3d at 516 (same).

But these decisions express differences in nuance, not a stark departure in approach. When analyzing whether the plaintiff has offered evidence showing pretext, both the Sixth and Seventh Circuits (and other circuits) focus their inquiry on whether the employee has shown that the employer's proffered reasons for its employment decision are not honestly held and reasonably based. *See, e.g., Smith*, 155 F.3d at 806 (employee must demonstrate that employer's reasons are not true); *Kariotis*, 131 F.3d at 676 (same). Even in the cases where the Seventh Circuit states disagreement with the Sixth Circuit, the Seventh Circuit acknowledges that reasonableness does play an important role in its analysis of pretext, and there is little practical difference in the two circuits' approaches to pretext. *Compare Flores*, 182 F.3d at 516 ("the more objectively reasonable a belief it, the more likely it will seem that the belief was honestly held") *with Smith*, 155 F.3d at 807 (analyzing "whether the employer made a reasonably informed and considered decision before taking an adverse employment action").

Moreover, when a plaintiff tries to prove pretext indirectly, the two circuits require plaintiffs to demonstrate pretext in nearly identical ways. In the Sixth Circuit, "The Plaintiffs can demonstrate pretext 'by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the Defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct.'" *Bender*, 455 F.3d at 624 (quoting *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576 (6th Cir. 2003)). The Seventh Circuit looks for almost exactly the same three things: "An applicant can raise a genuine issue of material fact about an employer's credibility by presenting evidence that the employer's explanation was [1] contrary to the facts, [2] insufficient to justify the action or [3] not truly the employer's motivation." *Target Corp.*, 460 F.3d at 960 (bracketed numbering added). Thus, despite different wording to describe their approaches, both the Sixth Circuit and Seventh Circuit approach pretext in largely the same manner.

C. The Seventh Circuit's Standard Is in Harmony with Other Circuits.

Also contrary to Merillat's representation, the circuits do not divide neatly into camps that apply the Seventh Circuit's standard or the Sixth Circuit's standard. This state of affairs is not surprising because, as shown above, the two standards are stated somewhat differently but in fact are very similar in their application and generally dictate the same outcome. It is also unsurprising that there is some variation in the way the standard for pretext is stated in the circuits, if for no other reason than the sheer number of employment discrimination

cases the courts address.[7] Faced with the myriad of facts and circumstances in these thousands of cases (such as the reduction-in-force circumstance in this case), it is no wonder that the courts' statements of the standards they apply sometimes diverge a bit.

The difference among the circuits Merillat tries to portray is overblown. For example, her claim that the First, Fourth, Eighth and D.C. Circuits take the same approach as the Sixth Circuit and use "more objectively based evaluations of whether an employer's reasons are worthy of credence" is not accurate. Pet. at 22. The very Eighth Circuit case she cites as following an "objective" approach, *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997), actually considers whether the employer honestly believed its explanation of its conduct toward an employee, looking at the facts and circumstances surrounding that belief. *Id.* at 840. It stated that "[t]he *ultimate* concern, of course, is whether the employer gave an honest explanation of its behavior." *Id.* (emphasis in original).

A more recent case also confirms that the Eighth Circuit does not follow what Merillat describes as an "objective" test: "Contrary to [the employee's] assertion, the proper inquiry *is not* whether [the employer] was factually correct in determining that [the employee] had made the bomb threats. Rather, the proper inquiry is whether [the employer] honestly

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[7] In one recent year, for example, the federal courts of appeal received 2,212 new appeals in private party employment discrimination cases. Administrative Office of the U.S. Courts, Federal Caseload Statistics Table B-7 ("Nature of Suit or Offense in Cases Arising from the U.S. District Courts, by Circuit, During the 12-month Period Ending March 31, 2006") (2006) http://www.uscourts.gov/caseload2006/tables/B07Mar06.pdf.

believed that [the employee] had made the bomb threats." *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005) (emphasis in original). The Court added that "even if [the employer] had no solid proof that [the employee] made the bomb threats, and even if [the employer] was mistaken in its belief that [the employee] had made the threats, any such mistake does not automatically prove that [the employer] was instead motivated by unlawful discrimination." *Id.* at 762-63.

Likewise, the First, Fourth and D.C. Circuits also do not apply a strictly objective approach to pretext that mirrors the Sixth Circuit's approach. For instance, in *Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228, 246 (1st Cir. 2006), *cert. denied*, 127 S.Ct. 1831 (2007), the First Circuit emphasized that, when evaluating pretext, the Court must focus on "the perception of the decisionmaker" and "whether the employer believed its stated reason to be credible," but also noted that the employer's "good faith belief is not automatically conclusive" and the plaintiff may "elucidate specific facts" that show that the employer's justification is a "sham." *Id.* The Fourth Circuit has recognized that courts should defer to the employer's business judgment, but plaintiffs may amass enough evidence that "undermines the credibility of the employer's stated reasons." *Hux v. City of Newport News, Va.*, 451 F.3d 311, 315 (4th Cir. 2006). Similarly, in *Fischbach v. District of Columbia Department of Corrections*, 86 F.3d 1180 (D.C. Cir. 1996), the Court emphasized that, when reviewing pretext, the Court should focus on "whether the employer honestly believes in the reasons it offers," but noted that evidence indicating that the employer made "an error too obvious to be unintentional" is relevant to the question of whether the employer's stated reason is a pretext for discrimination. *Id.* at 1183. Thus, the First, Fourth, Eighth, and D.C. Circuits place substantial weight on the

employer's subjective business judgment, but acknowledge that plaintiffs can show pretext through objective evidence.

Nor is Merillat's description accurate that the Ninth, Tenth and Eleventh Circuits follow the Seventh Circuit and "will not consider evidence that an employer's reasons were objectively unreasonable." Pet. at 22. For example, in *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808 (10th Cir. 2000), the Tenth Circuit reviewed pretext in a race discrimination case and stated that, although the court would not sit as a super-personnel department and review employment decisions with hindsight, "[e]vidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question of whether its stated reason is a pretext masking prohibited discrimination." *Id.* at 814 (quoting *Fischbach*, 86 F.3d at 1183). *See also Lowe v. Alabama Power Co.*, 244 F.3d 1305, 1308 (11th Cir. 2001) (favorably citing *Smith v. Chrysler* and stating that "the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action"); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282-85 (9th Cir. 2000) (emphasizing that plaintiff must challenge the "veracity of the reasons" given by the employer to establish pretext and evaluating in detail the objective evidence presented by plaintiff in support of the claim of pretext).

This brief exposition shows that any divergence among the circuits is neither clear, consistent, nor widespread. Rather than falling on either side of a sharp dividing line, the circuits recognize both the importance of an employer's honest belief in its reason for taking an employment action and the reasonable basis for that honest belief.

The Second, Third and Fifth Circuits, which Merillat did not discuss, further exemplify this approach. In *Byrnie v. Town of Cromwell Board of Education*, 243 F.3d 93, 105 (2d Cir. 2001), the Second Circuit analyzed an age and gender discrimination claim and stated that if "an employer's explanation, offered in clear and specific terms, is reasonably attributable to an honest even though partially subjective evaluation of . . . qualifications, no inference of discrimination can be drawn." *Id.* at 105 (internal quotation omitted). But a plaintiff can establish pretext by attacking the employer's credibility with objective evidence. *Id.* at 105-06.

Likewise, as the Third Circuit wrote in *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 283 (3d Cir. 2001), "it is not enough for a plaintiff to show that the employer's decision was wrong or mistaken, because the issue is whether the employer acted with discriminatory animus." Thus, the courts may use objective facts to analyze the reasonableness of an employer's belief. "[T]o make a sufficient showing of pretext [the plaintiff] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the employer's] reasons that a reasonable fact finder *could* rationally find them unworthy of credence." *Id.* (emphasis in original; internal quotation marks omitted). The Fifth Circuit appears to also give deference to the employer's subjective belief underlying its employment decision while permitting the plaintiff to point to objective evidence indicating that the belief is implausible or otherwise not worthy of credence. *See, e.g., Manning v. Chevron Chem. Co.*, 332 F.3d 874, 881-82 (5th Cir. 2003). This blend of "honest belief" and objective evidence is applied by all circuits, generally including (despite its overheated rhetoric) the Seventh.

II. The Seventh Circuit's Standard Comports with this Court's Case Law.

Contrary to Merillat's characterization, the Seventh Circuit's honest belief rule also follows this Court's holdings. As to pretext, the "employer's burden is satisfied if he simply explains what he has done or produc[es] evidence of legitimate nondiscriminatory reasons." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (internal quotation omitted). *Burdine* held that the lower court had improperly "placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff." *Id.* The Seventh Circuit's honest belief rule follows this Court's approach and mirrors the parties' proper burdens. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 523-4 (1993) ("Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race.").

The Seventh Circuit's honest belief rule evaluates the honesty of the employer's belief in its legitimate nondiscriminatory reason and thus is in harmony with *McDonnell Douglas*. The honest belief rule recognizes that what is at issue is the employer's intent, not the correctness of the employer's business judgment or acumen. *See Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1426 (7th Cir. 1986) ("It is not the court's duty to determine the validity of the defendant's business decision as long as the decision was made in good faith."); *Kariotis*, 131 F.3d at 677 ("[A]n opportunity for rebuttal is not an invitation to criticize the employer's evaluation process or simply to question its conclusion about the quality of an employee's performance....

[B]ecause the question is not whether the employer's reasons for a decision are right but whether the employer's description of its reasons is honest.") (internal quotation omitted).

To successfully oppose summary judgment under *McDonnell Douglas*, the employee must rebut the honesty of the employer's reason or point to evidence indicating discrimination. The employee may not challenge the wisdom of his employer's business decisions or judgment. Thus, a court appraises whether the employee proves that the employer's belief was dishonest. The honest belief rule implements this appraisal consistent with *McDonnell Douglas*.

III. This Case Does Not Present an Appropriate Opportunity to Analyze Pretext.

A. Any Difference Between the Circuits' Standards Would Not Affect the Outcome of this Case.

Merillat incorrectly asserts in her petition that some circuits, when analyzing pretext, look solely at the honesty of the employer's subjective belief and do not consider the objective evidence surrounding the reasonableness of the employer's belief. Pet. at 21-22. Metal Spinners showed in the previous section of this Brief in Opposition that all circuits actually overlay their "honest belief" inquiry with a reasonableness analysis. Thus, any difference among the circuits is more rhetorical than real.

But assuming there *is* variation among the circuits as to analysis of an employer's honest belief, this case would come to the same result no matter which circuit's standard were applied. In this case, the employer's honest belief that Merillat's position should be eliminated in the reduction-in-force was reasonably held, and Merillat designated no

evidence to controvert the employer's reasoning. As the Seventh Circuit explained, Metal Spinners believed it was appropriate to eliminate Merillat's position because: (1) many of her functions could be taken over by a computer system; (2) her educational qualifications and narrow experience were weak in comparison to Wehr's; (3) she had a history of problems in the past, including difficulty getting along with co-workers and suppliers; and (4) Wehr was better able to introduce new strategies. App. 14a.

Merillat admitted the first of these four legitimate, non-discriminatory reasons, App. 14a, so the Seventh Circuit did not go on to analyze the others. Metal Spinners honestly believed in this reason for eliminating Merillat's position, and it was reasonable for Metal Spinners to believe it because it was true (as Merillat admitted). For this Court to reach a different result in Merillat's case, it would not only have to reject Merillat's admission regarding the computer system but would also have to accept Merillat's invitation to revisit Metal Spinners' personnel choices. Merillat's argument also depends on her allegation that her job and Wehr's job were the same, which is not supported by the evidence and which both the District Court and Seventh Circuit rejected. *Supra* pp. 7-8.

Further, to perform the evidentiary weighing Merillat suggests, this Court would have to engage in the very "super personnel department" work that myriad courts have said they should not and will not do. *See, e.g.*, *Balderston*, 328 F.3d at 324; *Bender*, 455 F.3d at 627. Merillat argues that Metal Spinners should have preferred her 19 years of experience inside Metal Spinners rather than Wehr's stronger formal education and more varied work experience in the metals industry. Pet. at 27. But the employer, not the courts, should be able to make decisions about how to weigh

education and experience. Moreover, as multiple circuits have acknowledged, a plaintiff's self-serving statements about her subjective belief that she was more qualified or a better performer than the retained employees are insufficient to create an issue of fact regarding pretext. *See Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1196 (10th Cir. 2006); *Cichon v. Exelon Generation Co.*, 401 F.3d 803, 809 n.8 (7th Cir. 2005); *O'Bryan v. KTIV Television*, 64 F.3d 1188, 1191 (8th Cir. 1995). Merillat also argues that Metal Spinners should have installed computer upgrades sooner, so she could have benefited from them. Pet. at 26. Again, the timing of the upgrading of the computer system was a business judgment that, absent evidence of discriminatory intent, the courts should not second-guess.

Also, Merillat repeatedly points to events that occurred *after* she was terminated as purported evidence of pretext. Pet. at 28 (discussing post-termination evaluations of Wehr and purportedly weaker "inventory control" under Wehr). As several circuits have stated, such after-the-fact evidence is not relevant to the analysis of pretext because the employer could not have considered such evidence when it made its reduction-in-force decision. *See Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001) (noting that court looks only at the facts before the employer at time decision was made); *Tyler*, 232 F.3d at 813-14 (stating that courts will not use "twenty-twenty hindsight" of the facts to second-guess the employer's business decisions); *Fischbach*, 86 F.3d at 1183 (stating that court will not review business decisions with "20/20 hindsight").

Merillat not only asks the courts to second-guess personnel decisions, she also asks for review of the board of directors' decision to reduce the number of employees. Merillat argues that the reduction-in-force was not legitimate

because, if Metal Spinners were actually trying to cut costs, it would have terminated the higher-paid Wehr rather than Merillat. Pet. at 25. On summary judgment, Merillat identified no record facts supporting her position or contradicting the financial statements Metal Spinners submitted to show its losses. Moreover, reductions-in-force do not involve just terminating the highest-paid employees of a business. They involve more complex analyses of costs and productivity, and the courts are generally in no position to second-guess such decisions.

Merillat's inability to establish a triable issue of fact regarding pretext is not all that surprising. In light of the undisputed facts established below, Merillat would have to identify facts supporting a highly implausible conspiracy motivated by bias towards her. She would have to show that, motivated by discriminatory animus, Metal Spinners was willing to lose money for several months *and* terminate three other individuals (all of whom were male and one of whom was under age 40) to cover up its biased decision aimed at her. Not surprisingly, Merillat was not able to designate any evidence to support this conspiracy theory. In the end, Merillat has simply failed to designate any evidence that supports her claim of pretext.

Based on the evidence in the record, this case would be decided in the same way even under the most liberal reading of the Sixth Circuit's formulation. In *Smith v. Chrysler*, the Sixth Circuit noted that "the key inquiry is whether the employer made a reasonably informed and considered business decision before taking an adverse employment action." *Smith*, 155 F.3d at 807. Here, the undisputed facts show that Metal Spinners realized it was losing money in 2003 and decided that a reduction in force was necessary to address its economic losses. C.A. App. 231-32, 241-43, 252-

55. Metal Spinners' management identified four positions that could be eliminated, including Merillat's. C.A. App. 236-38, 253-56. It chose to eliminate Merillat's position rather than Wehr's because it had reasonable grounds to believe that Wehr was the better, more qualified individual to retain. He had much more education, possessed different experience, and lacked Merillat's history of interpersonal difficulties with co-workers and suppliers. C.A. App. 197-98, 209-15, 230-32, 246-47. Also, many of Merillat's duties could be performed by a computer system. C.A. App. 274. Metal Spinners made a reasonably informed and considered business decision, as required by the Sixth Circuit's standard. This case is not the type that the Sixth Circuit expressed concern about in *Smith* where an employer made an uninformed and obviously erroneous decision to terminate an employee. *Smith*, 155 F.3d at 807.

B. The Reduction-in-Force Context Makes this a Poor Case to Address Pretext.

This case also is a poor vehicle for addressing any circuit split because of its origin in a reduction-in-force. None of the cases cited by Merillat in support of her claim of a circuit split involved a reduction-in-force. Rather, they involved terminations, *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 44 (1st Cir. 2002), *Smith*, 155 F.3d at 802-03, *Kariotis*, 131 F.3d at 674-75, *Villiarimo*, 282 F.3d at 1058-60, *Rojas v. Florida*, 285 F.3d 1339, 1341 (11th Cir. 2002); failure to hire, *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1286-87 (D.C. Cir. 1998), *E.E.O.C. v. Sears Roebuck & Co.*, 243 F.3d 846, 849-51 (4th Cir. 2001), *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1308-09 (10th Cir. 1999); and failure to renew a contract, *Ryther*, 108 F.3d at 834.

Reductions-in-force present a poor opportunity to address any circuit split because of the very narrow range of potential pretexts. In most cases, the reduction-in-force itself is the legitimate, nondiscriminatory reason for termination. *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 371 (6th Cir. 1999). Accordingly, the only ways the plaintiff can prove pretext are by showing that the reduction in force itself was a pretext or showing that the reasons for including the plaintiff in the reduction-in-force were pretext. *See id.* at 373; *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1012-13 (7th Cir. 2000); *Pippin*, 440 F.3d at 1193.

In the reduction-in-force context, the purported split between the Circuits regarding pretext thus matters little. A reduction-in-force is usually necessitated by economic factors, and unless there is evidence that the reduction-in-force was fabricated or improperly manipulated to terminate the plaintiff there is usually not sufficient evidence of pretext to create a triable issue of fact.

This principle is demonstrated in cases from the Sixth and Seventh Circuits. The Sixth Circuit has stated that reductions-in-force "certainly qualify as legitimate, non-discriminatory reasons for the company's actions" and that, to overcome the assertion of a reduction-in-force, "plaintiffs must show, in essence, that [the employer's] 'business decision' was so lacking in merit as to call into question its genuineness" or that the evidence was "of sufficient significance itself to call into question the honesty of the employer's explanation." *Bender*, 455 F.3d at 624, 625, 627. Similarly, to prove pretext, the Seventh Circuit requires plaintiffs to show that the reduction-in-force was merely a sham to terminate employees in a protected class or that the employer did not have an honest, nondiscriminatory reason for including the plaintiff in the reduction-in-force. *Paluck*, 221 F.3d at 1012-13; *see also*

Schuster v. Lucent Tech., Inc., 327 F.3d 569, 574 (7th Cir. 2003) (stating that in a reduction-in-force case "an employee must establish that an improper motive tipped the balance in favor of discharge or that the employer did not honestly believe in the reasons it gave for firing him").

In reduction-in-force cases, the circuits apply very similar standards because employment decisions in such cases are dictated by outside economic forces, and often individuals who would not otherwise be targeted for dismissal are in fact terminated. Other circuits follow the approaches of the Sixth and Seventh Circuits, acknowledging that the issue of pretext is extremely narrow in the reduction-in-force context. *See, e.g.*, *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 252-53 (1st Cir. 2000) (limiting the analysis of pretext in reduction-in-force context to whether reduction-in-force itself was pretext or whether plaintiff was improperly included in the reduction-in-force); *Pippin*, 440 F.3d at 1193 (noting that in a reduction-in-force context the plaintiff can demonstrate pretext in only one of three ways, but in a "non-RIF context" the plaintiff can show pretext in variety of other ways).

The outcome of this case would not change under any version of the "honest belief" rule because Merillat failed to provide any evidence that Metal Spinners did not act on an honest belief that she was among the best candidates for termination or that its belief was not reasonable. Also, this case occurs in the context of a reduction-in-force, where the bases for arguing pretext are far narrower than in other contexts. It therefore is not a good case to resolve any circuit conflict relating to the "honest belief" rule.

CONCLUSION

There is no basis for certiorari here because any difference between the standards the circuits apply is more rhetorical than real. The cases show that all circuits look at both the employer's honest belief in its reasons for taking adverse employment action and the reasonableness of that honest belief. Morever, this case is not appropriate for resolving any discrepancy among the circuits because Merillat's claim would not succeed under any circuit's standard and there is no indication of a circuit split in cases such as hers, involving reductions-in-force.

This Court should deny the petition.

Respectfully submitted,

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